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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 518

MARK WENDELL PAINTER, a Minor, by HAROLD W. PAINTER, his Father and Next Friend,

Petitioner,

—v.—

DWIGHT BANNISTER and MARGARET BANNISTER, Husband and Wife,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

MOTION BY THE BOARD OF CHRISTIAN SOCIAL CONCERNS, NEW YORK ANNUAL CONFERENCE OF THE METHODIST CHURCH, FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI WITH THE PROPOSED BRIEF ATTACHED

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MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

This is a motion by the Board of Christian Social Concerns of the New York Annual Conference of The Methodist Church for leave to file a brief *amicus curiae* in the above entitled action. The consent of the attorneys for the petitioner has been obtained; the consent of the attorneys for the respondents has been denied.

The Annual Conference is the basic body of the Methodist Church. The United States is divided geographically into approximately 100 such Annual Conferences. The New York Annual Conference embraces some five hundred churches in the city of New York, Long Island, Westchester, the Hudson Valley south of Troy, and Connecticut west of the Connecticut River.

The Methodist Church, through its Discipline, provides for each Annual Conference to have a Board of Christian Social Concerns, among whose responsibilities is the task of lifting up before the members of the Church and the secular world specific issues which bear upon the well-being of the society in which we all dwell.

It is our view that fundamental to the Judeo-Christian tradition is the belief that God has made the family the basic unit of society. While the instant case is concerned with conflicting claims of custody of a single child, the decision of the Court below could have far reaching effects on the family relationship, inconsistent with the guarantees implicit in the Constitution.

This motion is made to voice the concern of all families who look to the religious community to speak out in support of the sanctity of the family unit.

Respectfully submitted,

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BRIEF OF THE BOARD OF CHRISTIAN SOCIAL CONCERNS, NEW YORK ANNUAL CONFERENCE OF THE METHODIST CHURCH, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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Respondents.

BRIEF OF *AMICUS CURIAE*

Interest of *Amicus*

The Board of Christian Social Concerns is an agency of the New York Annual Conference of The Methodist Church.

It is our view that fundamental to the Judeo-Christian tradition is the belief that God has made the family the basic unit of society. While the instant case is concerned with conflicting claims of custody of a single child, the decision of the Court below could have far reaching effects on the family relationship, inconsistent with the guarantees implicit in the Constitution.

The purpose of this brief is to voice the concern of all families who look to the religious community to speak out in support of the sanctity of the family unit.

Statement

The instant case arises out of a claim to the custody of an eight year old boy, Mark Painter, by the maternal grandparents of the child, Dwight and Margaret Bannister, Respondents in this Court.

The Petitioner in this Court, Harold W. Painter, initiated a proceeding in the District Court of Story County, Iowa for a Writ of Habeas Corpus directing that the infant be delivered into his permanent custody. Such an order was issued by that Court.

On appeal to the Supreme Court of Iowa, that Court reversed and remanded with instruction that judgment be entered consistent with its opinion awarding custody to the grandparents.

Petitioner has applied to this Court for a Writ of Certiorari directed to the Supreme Court of Iowa.

This brief is written in support of the Petition for Certiorari.

Questions Presented

1. Whether the sanctity of the family may be abridged by a state, in ordering that custody of an infant child be taken from its concededly fit parent, which parent has not abandoned or surrendered custody of the infant, consistent with the guarantee of the due process clause of the Fourteenth Amendment.

2. Whether a state, consistent with the guarantees of the First and the due process clause of the Fourteenth Amendments, may violate family sanctity by ordering custody of an infant to be transferred from a fit parent who has not surrendered or abandoned such infant, because of the political and religious beliefs of such parent.

Reason for Granting Writ

Important questions of federal law are raised by the decision of the Court below, which questions have not been but should be decided by this Court.

The decision of the Court below could have far reaching effects on the family relationship, inconsistent with the guarantees implicit in the Constitution. The sanctity of the family as we have come to know it under our Anglo-American law could be drastically altered.

POINT I

A state may not abridge the sanctity of the family by ordering the custody of an infant child to be taken from its concededly fit parent, which parent has not abandoned or surrendered custody of the infant, consistent with the guarantee of the due process clause of the Fourteenth Amendment.

A universally accepted principle of law is to the effect that the natural parent has a presumptive right to the custody of his child in the absence of a showing

of abandonment and unfitness. *People ex rel. Kropp* v. *Shepsky,* 305 N.Y. 465, 113 N.E. 2d 801 (1953); *Stout* v. *Stout,* 166 Kan. 459, 201 P. 2d 637 (1949); *Blow* v. *Lottman,* 75 S.D. 127, 59 N.W. 2d 825 (1953); *Stinson* v. *Meegan,* 318 Mass. 459, 62 N.E. 2d 113 (1945); *Parks* v. *Crowley,* 221 Ark. 340, 253 S.W. 2d 561 (1953); *State ex rel. Martin* v. *Garza,* 217 La. 532, 46 So. 2d 760 (1959); *Rodale* v. *Grimes,* 211 Ga. 674, 87 S.E. 2d 857 (1955); *Griggs* v. *Barnes,* 257 Ala. 21, 57 So. 2d 61 (1952); *Commonwealth ex rel. Harry* v. *Eastridge,* 374 Pa. 172, 97 A. 2d 350 (1953); *Harper* v. *Tipple,* 21 Ariz. 41, 184 Pac. 1005 (1919); *Hardcastle* v. *Hardcastle,* 118 Utah 192, 221 P. 2d 883 (1950); *Ex Parte Ward,* 39 Wash. 2d 894, 239 P. 2d 560 (1952); *Marcum* v. *Marcum,* 265 P. 2d 723 (Okla., 1954); *Stewart* v. *Stewart,* 31 Cal. 2d 447, 260 P. 2d 44 (1953); *Wright* v. *People,* 131 Colo. 92, 279 P. 2d 676 (1955); *Horn* v. *Horn,* 5 Ill. App. 2d 346, 125 N.E. 2d 539 (1955); *Lanigne* v. *Family and Children's Society of Elizabeth,* 18 N.J. Super. 559, 87 A. 2d 739 (1952); *Starnes* v. *Jost,* 228 S.W. 2d 563 (Tex. C.A. 1950); *Reynolds* v. *Davidow,* 200 Miss. 480, 27 So. 2d 691 (1946). See particularly, *Portnoy* v. *Strasser,* 303 N.Y. 539, 104 N.E. 2d 895 (1952); *Sklaroff* v. *Skeadas,* 84 R.I. 1, 120 A. 2d 694, *cert. den.* 305 U.S. 988 (1956), where under factual situations more far-reaching than here present, State Courts have upheld the rights of the natural parent. See also, the decision of the Circuit Court of Appeals for the District of Columbia, *Bell* v. *Leonard,* 251 Fed. 2d 890 (1958).

The right of a state, acting through the Court as *parens patriae* is not without limitation. *Meyer* v. *Nebraska,* 262 U.S. 390 (1923). See also, *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925). Nor is there

any question but that the action of a Court and its judicial officers is within the reach of the Fourteenth Amendment. *Shelley* v. *Kraemer* 334 U.S. 1 (1948).

To breach traditional concepts of law and culture because the Court below concludes that respondents may furnish the infant "with a stable, dependable, conventional, middle-class, middlewest background", whereas the kind of life the infant would be exposed to in petitioner's household would be "unstable, unconventional, arty, Bohemian and probably intellectually stimulating" exceeds the right of a state Court acting as *parens patriae*, and falls within the prohibitions of the Fourteenth Amendment. *Meyer* v. *Nebraska, supra,* 262 U.S. 390 (1923); *Pierce* v. *Society of Sisters, supra,* 268 U.S. 510 (1925); *Prince* v. *Massachusetts,* 321 U.S. 158 (1944).

POINT II

A state may not violate family sanctity by ordering custody of an infant to be transferred from a fit parent who has not surrendered or abandoned such infant, because of the political or religious beliefs of such parent, consistent with the guarantees of the First, and due process clause of the Fourteenth, Amendments.

"Mr. Painter is either an agnostic or atheist and has no concern for formal religious training. He has read of lot of Zen Buddhism and 'has been very much influenced by it.' Mrs. Painter is Roman Catholic. They plan to send Mark to a

Congregational Church near the Catholic Church, on an irregular schedule.

"He is a political liberal and got into difficulty in a job at the University of Washington for his support of the activities of the American Civil Liberties Union in the university news bulletin." (Opinion of the Iowa Supreme Court, found in petitioner's brief, appendix B at p. 7a.)

To breach the family relationship because the parent is "either an agnostic or atheist and has no concern for formal religious training"; because "he is a political liberal"; because of his "support of the activities of the American Civil Liberties Union" is a denial of the First and Fourteenth Amendments rights that by now should be beyond serious challenge in this Court.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 642 (1943).

"The priceless heritage of our society is the unrestricted right of each member to think as he will." *American Communications Ass'n* v. *Douds,* 339 U.S. 382, 393 (1950).

"Fundamental is the right of the parent to rear his child in a particular religious faith, or to rear him as a non-believer if he so elects." *Lewis* v. *Spaulding,* 193 Misc. 66, 73; 85 N.Y.S. 2d 682, 690 (Sup. Ct., Albany County, 1948).

To the extent that the conclusion of the Court below is influenced by the stated religious and political beliefs, its holding would be but a form of a denial of those federally guaranteed rights in a manner that is cruel and unusual to the extreme, by sanctioning deprivation of a father's right to the custody of his son, and the son's essential right to the companionship of his father.

CONCLUSION

The Writ of Certiorari should be issued.

Respectfully submitted,

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